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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 218.

WILLIAM C. ATWATER AND COMPANY, INC., *Appellant*,

vs.

THE UNITED STATES.

ON APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

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I.

The true construction of the contract:

(a) Under a proper construction of the contract the appellant was not obligated to deliver steaming coal to the Navy Department in excess of 200,000 tons.

(b) The appellant could not be held responsible for the fulfillment of its contract during any war in which the United States was engaged and which affected it.

II.

The contract is not a "requirements contract," and the construction placed upon it by the Government and by the Court of Claims below would render it unenforceable for lack of consideration and mutuality.

III.

Delivery of the excess tonnage under protest did not commit the appellant to accept the purchase price set out in the contract.

STATEMENT OF THE CASE.

This case is before this Court on appeal from a judgment of the Court of Claims in favor of the United States on a general traverse.

In the spring of 1916 the Navy Department desiring to enter into contracts for coal, issued an invitation for bids in the form of a proposal numbered 9485. This proposal contained descriptions of the kinds of coal which the Navy wanted for delivery in *stated* quantities at *ten different ports or stations.* (Rec. 12.)

Included therein and designated as "Class 18" was a proposal for bids to furnish 600,000 tons of steaming coal to be delivered f.o.b. vessels or barges under chutes at respective piers at Hampton Roads, Va. (Rec. 12.)

The general specifications in the proposal contained the following provisions under the subhead, "Quantities Estimated":

> "It shall be distinctly understood and agreed that it is the intention of the contract that the

contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obliged to order any specific quantity.

"The estimated quantities have been arrived at from the records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only and are not to be considered as having any bearing upon the quantity which the Government may order under the contract."

Under the subhead "Reservations" appeared the following:

"The Government reserves the right to reject any or all bids, and in accepting any bids for the different ports of delivery named, the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government."

Under the subhead "Notes" appeared the following:

"(a) Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications.

(b) Contractors will not be held responsible for fulfillment of their contracts during any war

in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes or combinations of miners, laborers, or boatmen, accidents at the mines, or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be canceled to an extent corresponding to the extent or duration of such war, strikes, combinations, accidents, interruption, or shortage, and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes." (Rec. 12 and 13.)

The appellant submitted its bid for the furnishing of 200,000 tons of the 600,000 tons total of steaming coal desired by the Navy for delivery at Hampton Roads, Va., at a price of $2.80 per ton. On June 5, 1916, the parties entered into a contract numbered 26,488, and made a part of the petition in the Court of Claims, by reference as Exhibit A. (Rec., 5 to 11, and 13.)

The contract in its physical construction was made up largely of portions of the proposal which were clipped therefrom and pasted on and thus made a part of the physical makeup of the contract. (Rec. 13.)

On March 26, 1917, the appellant was informed by the Paymaster General of the Navy that it would be required to furnish ten per cent in excess of the quantity of coal specified in the contract. The appellant wrote, in reply to this communication, expressing its surprise, and stating that it had bid specifically on 200,000 tons, and that under its contract it was not obliged to supply any coal in excess of this amount. (Rec. 13.) It further called attention to the heavy

curtailment in production at its mines, due to shortage of cars and labor, because of which it had only been able to deliver 75 per cent of other contracts. By reason of these conditions it was felt by its operatives that they had met in full their obligations to the government by delivering the specified 200,000 tons during the contract period. The Paymaster General replied thereto, citing and quoting provisions of the contract as authority for requiring thereunder an additional tonnage over and above the 200,000 tons, stating that the excess tonnage required was being prorated and the same requirements were being made of other contractors, and that the contract price must apply to the total requirements during the fiscal year. (Rec. 13.)

On April 17th appellant called attention to the "relief clause" in the contract, submitting a statement as to available car supply and maintained that on that basis it was only obliged to deliver up to April 1, 1917, 148,357 tons. Whereas it had actually delivered to said date 160,377 tons, a claimed excess of 12,020 tons, and stated that "the total of 220,000 above referred to was subject to the reduction of 12,020 tons, making the actual tonnage deliverable by it under its contract 207,980 tons."

The Navy Department replied by letter to this communication on April 30th, insisting that the 10 per cent additional must be delivered under the contract, and informed the appellant that it could not be recognized that it was entitled to any relief on account of equipment shortage, as in this respect the Navy was accorded preferential treatment, and the Department had not failed to obtain the cars required

by its suppliers when request for cars to move Navy tonnage had been received.

Replying to this letter of the Navy Department, the appellant stated that it did not agree with the Department, but admitted that the Navy had for some time been accorded preferential treatment in the matter of cars, and conceded that the preferential arrangement be related back to January 1, 1917, and on that basis stated that—

> "The total of 220,000 tons requisitioned by the Department under our contract is therefore subject to reduction to the extent of 8,219 tons, making the actual tonnage deliverable under the contract 211,781 tons." (Rec. 14.)

On April 26, 1917, the Navy Department informed the appellant that it could not recede from its request for the 10 per cent additional tonnage over the quantity specified in the contract. On May 22, 1917, the appellant replying to a demand to furnish 10,000 tons to be delivered at Lamberts Point between June 1 and June 10, stated the conditions of its contract, and showed that 204,430.19 tons had been delivered and that assignments had been made to barges of 2650 tons, a total of 207,080.19 tons, and stating that—

> "The above assignment added to this tonnage will make a total of 217,080.19 tons, leaving 2920 tons still to go all rail."

On June 2, 1917, appellant wired the Department referring to recent telegrams, and saying—

> "We beg to call attention to department's notice to us under date March twenty-sixth we

> would be required to deliver contract tonnage plus ten per cent, eight-two hundred nineteen tons of which by reason of short car supply we are delivering under protest. With completion of your requisition for ten thousand tons May twenty-first, two hundred and twenty thousand tons will have been delivered, being eight-two hundred nineteen tons in excess of tonnage required to complete contract." (Rec. 13 and 14.)

The appellant delivered to the Navy Department 219,990 tons of coal, being 19,990 tons in excess of the quantity stated in the contract; 211,781 tons (being 220,000 tons less 8219 tons) were billed at $2.80 per ton, the contract price, and the remainder was billed at $6.50 per ton. All of the tonnage was paid for at the contract price, over the protest of the appellant. (Rec. 14.) At the time the 19,990 tons of coal in excess of 200,000 tons were delivered to the Navy Department, the market value thereof was $6.50 per ton; the 19,990 tons of coal furnished by the appellant to the Navy Department were worth in the market $73,964.48 in excess of the contract price, therefore, as found by the Court of Claims. (Rec. 14.)

The Court of Claims upon the above facts concluded as a matter of law that the appellant was not entitled to recover and that its petition should be dismissed with judgment against it for the cost of printing, to be taxed by the Clerk, and judgment was directed accordingly. (Rec. 15.)

In its opinion the Court of Claims based its decision upon that given in the case of *Willard, Sutherland & Company vs. The United States.* (Now before this Court on appeal. No. 209, this term.) In that case, upon similar facts arising out of a contract made at

approximately the same time pursuant to the same proposal and containing the same verbiage and physical make-up as the contract in this case, the Court denied recovery on the following grounds:

1. If the contract for the total quantity required at Hampton Roads, to wit, 600,000 tons, had been entered into by one bidder, that bidder would be liable to supply the needs at Hampton Roads even if they had been in excess of 600,000 tons (citing *Brawley vs. The United States,* 96 U. S. 168). The court then concluded that if this total amount had been apportioned between several bidders and the plaintiff was one of the bidders, that plaintiff must assume its proportionate part of the entire obligation and be subject pro rata to the same requirement.

2. Assuming that plaintiff was not obligated under the contract to furnish the additional amount, a mere protest followed by actual delivery concluded the obligation of the plaintiff on the terms of the contract and that the plaintiff's only course would have been to refuse to make further deliveries.

This in essence is the opinion of the Court in the *Willard, Sutherland Case.*

The Court of Claims, in the opinion in this case, then went on to say that the chief difference was found in the fact that this appellant claimed release under another clause from furnishing 8219 tons and as to that only they demanded the market price and saying that if the case had been presented on that basis the Court would have had difficulty in finding merit in it, but that that theory was abandoned and the claim made was, as in the *Willard, Sutherland Case,* for the market price for all coal furnished in excess of the estimated 200,000 tons. Without dis-

cussing this point the Court concluded its opinion on the authority of the *Willard, Sutherland Case,* and dismissed the appellant's petition.

I.

(a) Under a proper contruction of the contract the appellant was not obligated to deliver steaming coal to the Navy Department in excess of 200,000 tons.

There was a written contract entered into by the appellant and the United States, and the parties' obligations are to be strictly determined by that instrument. The contract, therefore, must speak for itself. In considering this contract, however, it is of the utmost importance that the Court understand its physical make-up. The contract which is set out in full as Exhibit A at page 5 of the record was drawn by the Navy Department for the signature of the appellants, and was made out on a printed blank, on which was pasted certain printed matter, and printed forms clipped from a copy of the printed proposal in which the Navy solicited bids on the 600,000 tons of coal for delivery to it at Hampton Roads, Virginia. (Rec. 13.) The "200,000 tons," the amount which this appellant bid to furnish, together with the price, was typewritten into the contract.

The most superficial reading of the contract as set out on page 5 of the Record shows that it contains many provisions which can have no bearing whatsoever on the subject-matter. Thus it provides on page 9 that—

> "all workmanship and materials entering into the manufacture or construction of any article or ar-

ticles under this contract, shall be of the very best commercial quality, etc."

Again—

"It is further covenanted and agreed that the said party of the first part shall indemnify the United States, and all persons acting under them, for all liability on account of any patent rights granted by the United States that may be affected by the adoption or use of the articles herein contracted for."

The Court of Claims in the case of *Willard, Sutherland & Company vs. The United States,* a case arising under a contract similar to this one, in fact a bid on the same invitation, criticised very severely this "patchwork method of constructing a contract."

This Court also in the case of *Freund and Roemmich vs. The United States* (Nos. 29 and 37, October Term, 1922), in an opinion handed down during the present term of court, most justly deprecated the use of such methods in the drawing of government contracts.

It is submitted that the construction of this contract should be approached with a full realization of its physical structure, and the many conflicting and totally irrelevant provisions which it contains.

The first paragraph of the contract reads as follows:

"A contract numbered as stated above and dated June 5, 1916, has been entered into with Wm. C. Atwater & Co., Inc., of 1 Broadway, New York, N. Y., for furnishing the following articles to be delivered at the place and within the time stated for each class, and at the price set opposite each item, respectively, and, unless otherwise

provided, to be subject to the terms of the above contract quoted on the back hereof:"

This paragraph is followed by these words:

"To be delivered as specified below at such times and in such quantities as may be required during the fiscal year ending June 30, 1917."

This is immediately followed by the words, "Stock Classification No. 8."

"200,000 tons steaming coal, as follows:

(a) for delivery f.o.b. vessels or barges under chutes at respective piers, Hampton Roads, Va., per ton—*$2.80. $560,000.00."* (Rec. 5.)

It is submitted that reading the clause: "To be delivered as specified below at such times and in such quantities as may be required, etc.," in connection with what is "specified below," viz.: 200,000 tons steaming coal at $2.80 per ton, $560,000, can lead to no other conclusion but that the plain meaning of the words are that 200,000 tons of steaming coal are to be delivered at such times and in such quantities as may be required by the Navy Department. The specification immediately following the delivery clause does not provide for 200,000 tons "more or less," nor is the amount modified by any such language. As if to make the specification more definite, the price per ton is followed by a computation based on the 200,000 tons which results in fixing the total obligation of the United States under the contract at $560,000.00.

Several clauses follow which provide for compensa-

tion for any extra work that may be done in connection with the loading of barges, etc. Then come paragraphs providing for information which must be furnished by the bidder, "without which the proposal will be informal." Manifestly these were clipped from the invitation for bids. Then follows a clause reading:

> "C. For delivery f.o.b. cars at the Mines, per ton, $1.40, etc."

Of course this clause is in conflict with that clause providing for delivery f.o.b. Hampton Roads at $2.80, especially in view of paragraph (b) of the notes, which requires that—

> "prices quoted must be net prices and not subject to any increase on account of freight rates."

The mines are then set out with their location. (Rec. 6.)

Then follows the

> "General Specifications and Conditions Governing all Classes of this Schedule as Applicable."

Of course this was a part of the invitation for bids which was pasted onto the contract.

Under "Quantities Estimated," the following language is used:

> "It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver any quantity of the coal specified which may be needed for the naval service at the places named during the period from July 1, 1916, to June 30, 1917, irre-

spective of the estimated quantities stated, the Government not being obligated to order any specific quantity.

The estimated quantities have been arrived at from records of previous purchases. While they represent the best information obtainable as to the quantities which will be required during the period covered by the contract, they are estimated only, and are not to be considered as having any bearing upon the quantity which the govment may order under the contract." (Rec. 7.)

The first paragraph provides that the contractor shall furnish and deliver "any quantity of the coal specified which may be needed, etc." Now it is submitted that "any quantity of the coal specified" means any quantity of the 200,000 tons, which was specified on the first page of the contract. This is the plain, unambiguous meaning of the language. In order to reach the construction contended for by the Government and adopted by the Court of Claims, it is necessary to read two words, viz., "kind of," into this paragraph in order that it reads as follows:

> "The contractor shall furnish and deliver any quantity of the *kind of* coal specified."

The quantity of the coal specified is 200,000 tons. To import the words "kind of" into this clause would plainly work a complete reformation of its terms, and no court has the power to import terms into or reform a contract except where the terms in question were omitted through mistake or fraud. *Baltzer vs. Raleigh and A. R. R. Co.*, 115 U. S. 634. To interpolate the phrase "more or less," after the amount expressly specified in the contract, viz., "200,000 tons," and the

word "kind of" in the clause quoted above would most obviously work a reformation of this contract.

The Government does not contend and never has contended nor did the Court of Claims suggest that these terms were omitted through mistake or fraud. Indeed there can be no grounds for any such contention because the contract was prepared by the Navy Department itself. As is well known to this Court when the language of an instrument requires construction it shall be taken most strongly against the party who prepared the instrument even though that party be the United States. *Garrison vs. United States,* 7 Wall. 688.

It will be helpful to turn to other portions of the contract in which the words "quantity of coal specified" or their equivalent are used in order to ascertain just what significance the Navy Department intended to give these words.

Thus in the opening paragraphs it is said that the coal is:

> "to be delivered as specified *below* at such times and in such quantities as may be required."

As pointed out *supra* the specification immediately following and *below* is: "200,000 tons f. o. b. Hampton Roads at $2.80 per ton, totaling $560,000.00." Under paragraph (a) of the "Notes" it is said that "bids on less than the entire quantity specified under each class will be received and considered." The same words are here used and can it be doubted that they refer to the amount of tonnage specified and not to the kind or variety of coal? The words "under each class" provide for the "kind of coal." Again in the clause

headed "Deliveries" under "the general specifications" it is said:

> "Deliveries to be made promptly, and in lots or quantities specified for different ports named on call."

In this clause the words "quantities specified" can have no other meaning than the amount of tonnage. It is more than a coincidence that whenever the words "quantity of the coal specified" or their equivalent is used in other paragraphs of the contract their meaning is obviously limited to the amount or quantity of the tonnage. *The contract itself construes the words.*

With this construction of the first clauses of the first paragraph established, the closing clauses of the first paragraph as well as the second paragraph become merely elaborative of the fundamental provision announced in the opening clauses.

The "quantities estimated" clauses are followed by provisions as to quality, delivery, freight terminal charges, and payment which have no direct bearing on the issues in this case. Following these clauses is a paragraph headed "Reservations." The paragraph as printed in Exhibit A, page 8 of the Record, is erroneous in that the words "And in accepting any bids" following the word "bids" have been omitted. The Court is asked to refer to the clause as set out in the finding of facts on page 12 of the Record, where the full language is quoted. This clause becomes important in a later part of the brief where the question of consideration is discussed.

Immediately following this paragraph come the "Notes." Paragraph (a) of the "Notes" provides

"(a) Bids on less than the entire quantity of coal specified under each class will be received and considered. Such partial bids must state the amount of tonnage it is proposed to furnish, subject to the other conditions of these specifications."

Of course, this paragraph has to do with the bids and is the authority on which the appellant put in his bid on less than "the entire quantity specified," viz., 600,000 tons, and "stated the amount of tonnage it is proposed to furnish," viz., 200,000 tons, "subject to the other conditions of these specifications," viz., quality, deliveries, etc., etc.

"Note" (b) is a clause exempting the contractors among other things from liability during any war in which the United States may be engaged and which may affect them. This provision will be discussed in a later section of this brief.

The remaining portion of the "Notes" have no direct bearing on the points in issue in this case. The closing provisions of the contract also have no direct bearing on the case and in addition many of the paragraphs as pointed out above contain provisions totally irrelevant to the subject-matter of the present contract and demonstrate the careless and patchwork method employed by the Navy Department in the drafting of the contract.

The Government contended before the Court of Claims and that Court held, following its decision in the *Sutherland* case upon the authority of *Brawley vs. The United States,* 96 U. S. 168, that the contractor here was required under the contract involved, to furnish the coal required by the Navy at Hampton Roads during the period covered by the contract al-

though the total amount required might be in excess of the amount specified in the contract.

In the *Brawley Case,* the contract was to furnish:

> "Eight hundred and eighty (880) cords of sound, of first quality, of merchantable oak wood, *more or less, as shall be determined to be necessary* by the Post Commander for the regular supply in accordance with army regulations of the troops and employees of the garrison of said Post for the fiscal year beginning July 1, 1871, and ending June 30, 1872. The delivery of eight hundred and eighty (880) cords to be completed on or before January 1, 1872; *but any additional number of cords of wood that may be required over and above that amount may be delivered from time to time,* regulated by the proper military authorities based upon the actual necessities of the troops for the period above mentioned. (Italics ours.)

It is plain from the *italicized* words that the contract in that case contemplated "more or less" than the 880 cords according to the requirements and it is distinctly provided that an additional number of cords "over and above" 880 cords "may be required." There is no possible doubt from the clause as quoted that the contractor in that case was to supply the *requirements* whether they might be "more or less" than the 880 cords specified.

Compare those terms with the terms employed in the contract here involved. The Atwater Company under this contract is to furnish:

> "*200,000* tons steaming coal, as follows: (a). For delivery f. o. b. vessels or barges under chutes at respective piers, Hampton Roads, Virginia, per ton $2.80. . . . . $560,000."

Then follows a page or more of detailed prices for various loading services and descriptions of coal. On the succeeding page comes the following clause

> "It shall be distinctly understood and agreed that it is the intention of the contract that the contractor shall furnish and deliver *any quantity of the coal* specified which may be needed for the naval service at places named during the period from July 1, 1916, to June 30, 1917, irrespective of the estimated quantities stated, the Government not being obligated to order any specific quantity."

We simply ask this Court to compare the terms used in the *Brawley Case* with the terms quoted from the contract here involved. In the *Brawley Case* there can be no doubt about the contract's comprehending more than 880 cords as well as less than that amount—In other words, the *requirements.*

In this case:

> "The contractor shall furnish and deliver *any quantity of the coal specified* which may be needed, etc."

What was the "quantity of coal specified?"

The only quantity specified in the contract is "200,000 tons."

The clause might have read:

> "The contractor shall furnish and deliver any of the 200,000 tons which may be needed, etc."

The words "any quantity of the coal specified" makes this a "maximum" contract at most. We adopt the word "maximum" contract as completely descrip-

tive. The 200,000 tons is the maximum covered by the contract and the Government can take any part or all of that amount as its needs dictate; no amount in excess of 200,000 tons is even suggested. The whole clause is simply a reservation, a qualification upon the Government's obligation under the previous clause on the preceding page, to receive and pay for 200,000 tons.

There is not the slightest suggestion in this language that any greater amount than the 200,000 tons specified is contemplated. In this connection, we would point out that nowhere in this clause or in any clause in the whole contract are those usual qualifying terms "more or less" or words of similar import, used. The words "any quantity of the coal specified" might be held to be equivalent in their effect to "less," but by no stretch of language can those words be construed to comprehend "more." Therefore, we say, the contract at most can be only a "maximum" contract, and consequently falls short of being a "requirements" contract.

If such a meaning is given to the estimated quantities clause, then there is no conflict between that clause and the clause on the preceding page specifying the "200,000 tons." There is then no ambiguity in the contract.

The construction contended for by the appellant in this case is supported by the following cases:

In *United States v. Utah, etc., Stage Company,* 199 U. S. 414, the contract in dispute was a mail contract. Among other provisions the contract required the contractor:

> "To perform all new or addtional or changed covered regulation wagon, mail messenger, transfer and mail station service that the Postmaster General may order at the City of New York, N. Y., during the contract term, without additional compensation, whether caused by change of location of postoffice, stations, landing or the establishemnt of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service."

A new distribution station was established and an order was made by the Second Assistant Postmaster General requiring additional mail service to supply this station resulting in a heavy additional burden to the contractor. In its opinion, this Court, after going at great length into the additional burden imposed upon the contractor, at pages 422 and 423, said:

> "There must be some limit to the service which can be required without additional compensation, under the authority vested in the Postmaster General by the contract, to call for new or additional service of the same character. Otherwise it is within the power of the Government to ruin a contractor by new and wholly unanticipated demands, which caution and prudence, however great, could not have foreseen. If this were a contract between individuals, a claim of the right to require this vast amount of additional work—evidently not within the contemplation of the parties—without additional compensation would hardly be seriously entertained."

Again, at pages 423 and 424:

> "We cannot believe it possible that the parties to this contract contemplated the establishment of a new postal department in the City of New York not then authorized by any Act of Congress, etc."

Certainly, the language of the contract in that case was much more comprehensive and sweeping than that in the contract now under consideration. The contractor was to render the additional service whether caused by the "establishment of others (stations) than those existing at the date hereof, or rendered necessary in the judgment of the Postmaster General for any cause." It would seem that the establishment of the new station would come directly within the purview of these words, whereas the interpretation contended for by the Government in the present case requires a strained construction. That was certainly a stronger case for the Government on the strict construction of the words.

What then was the *ratio decidendi* of the Court? First, it is said that there must be some limit to the service which can be required, otherwise it is within the power of the Government to ruin a contractor. Take the facts in the present case. The appellant was engaged "in the business of shipping Pocahontas smokeless coal and coke." (Rec. 11.) The price of the coal contracted for f. o. b. the mines and f. o. b. Hampton Roads, showed that one-half of the f. o. b. price at Hampton Roads was reflected in the freight rate and hence was not a source of profit to the appellant. The price at the mines was $1.40 a ton (Rec. 6), or a total of $280,000.00. It can readily be seen that even the most

liberal profit on this basis would be wiped out by a loss of approximately $74,000.00.

This Court in the *Utah Stage Company Case, supra,* then goes on to say that this vast amount of additional work was not within the contemplation of the parties, and that it

> "could not believe it possible that the parties to this contract contemplated the establishment of a new postal department, etc."

In the present case it is apparent that this need of extra coal on the part of the Navy Department was occasioned by the war, and that in consequence thereof the price rose from $2.80 to $6.50 a ton—more than 100 per cent. When these circumstances are coupled with the fact that in the present case we do not have to go without the contract itself to ascertain the intention of the parties, the reasoning of the *Utah Stage Company Case* is much more forceful in its application to these facts. The intention of the parties is most clearly expressed in paragraph (b) of the "Notes" where it is said:

> "Contractors will not be held responsible for fulfillment of these contracts during any war in which the United States may be engaged and which may affect them."

Hunt v. United States, 257 U. S. —, 42 Sup. Ct. Rep. 5, was another case involving a mail contract. The facts were similar to those in the *Utah Stage Company* case and this Court again held that the contractor was not bound to furnish the extra service without extra compensation.

In *Freund and Roemmich vs. The United States* (Nos. 29 and 37, October Term, 1922), the contract contained the following among other provisions:

> "It is hereby stipulated and agreed by said contractors and their sureties that the Postmaster General may change the schedule, vary, increase or decrease the trips on this route, or extend the trips to any new location of the post offices, * * * establish service to and from like offices, etc."

Compensation was provided for on a mileage basis. The Department relying on the above clauses substituted a more onerous route. In allowing appellants to recover additional amounts for the increased service the Court said:

> "It is, of course, wise and necessary that Government agents in binding their principal in contracts for construction or service should make provision for alterations in the plans, or changes in the service, within the four corners of the contract, and thus avoid the presentation of unreasonable claims for extras. This Court has recognized that necessity and enforced various provisions to which it has given rise. But sometimes such contract provisions have been interpreted and enforced by executive officials as if they enabled those officers to remould the contract at will. The temptation of the bureau to adopt such clauses arises out of the fact that they avoid the necessity of labor, foresight and care in definitely drafting the contract, and reserve power in the bureau. This does not make for justice, it promotes the possibility of official favoritism as between contractors and results in enlarged expenditures, because it increases the prices which contractors, in view of the added risk, incorporate in their bids for Gov-

ernment contracts. These considerations, especially the first, have made this court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into."

It is submitted, therefore, that the contract in the present case is not susceptible of a construction which would allow the Government to call for any coal in excess of the 200,000 tons specified in the contract.

(b) The appellant could not be held responsible for the fulfillment of its contract during any war in which the United States was engaged and which affected it.

Reference to the findings of fact at page 12 of the Record will show that sub-head (b) of the "Notes" contained the following provision:

> "Contractors will not be held responsible for fulfillment of their contracts during any war in which the United States may be engaged and which may affect them, or if prevented from doing so by strikes or combinations of miners, laborers or both, accidents at the mines or interruption or shortage of transportation. In such cases the obligation to deliver coal under their contracts will be canceled to an extent corresponding to the extent or duration of such war, strikes, combination, accidents, interruption or shortage and no liability shall be incurred by the contractors for damages resulting from their inability to fulfill their contracts on account of the aforementioned causes."

In answer to the communication of the Paymaster General of the Navy, dated March 26, 1917, and which notified the Atwater Company that the Navy Depart-

ment would require coal in excess of 200,000 tons from it, the appellant replied, mentioning the heavy curtailment of production of coal at its mines due to shortage of cars and labor and stated that it felt that it had fully met its contractual obligations to the Government. (Rec. 13.) Again on April 17th the Atwater Company cited the provision quoted above and requested relief—more specifically calling attention to the coal car shortage. The Navy Department replied that it had always enjoyed preferential treatment in the allotment of cars. (Rec. 13. 14.)

Of course, the rejoinder of the Navy Department was purely argumentative in that it was the contention of the Atwater Company that this shortage of equipment had tied them up in all their contracts and had put them behind some 25 per cent in their obligations to their other customers. The Company took the position that in view of these circumstances it was unreasonable for the government to insist on the delivery of excess quantities of coal in the face of the plain provisions of paragraph (b) of the "Notes."

Of course this court will take judicial notice of the fact that the United States entered the Great War on the 6th of April, 1917. The record also shows the great rise in prices of coal at Tidewater markets. (Rec. 14.) The court is also judicially cognizant of the fact that the whole nation was at this time preparing to throw its full resources behind the Allied effort in France, and that, therefore, the whole economic structure of the country was directed to this one object irrespective of its effect upon the commercial interests of the individual. Particularly were the lines of transportation clogged and congested; labor shortages were becoming acute, due to the drift of all

classes of labor into factories producing munitions and war supplies for our Allies.

It is therefore submitted that the very sweeping exemption under "Note" (b) exempting contractors from responsibility for the "fulfillment of their contracts during any war in which the United States may be engaged and which may affect them," fully provided for this contingency, especially when the contractor had lived up to the maximum amount of the coal specified in the written contract. It is further submitted that the appellant only sought to avail itself of this ground for not furnishing coal in excess of 200,000 tons to the government. It would, therefore, seem to follow that even had the contract between the Atwater Company and the Navy Department obligated the Atwater Company to furnish coal in excess of 200,000 tons to the Navy Department, that "Note" (b) and the Company's action thereunder was a full and sufficient release of the Atwater Company from further performance after the United States had entered the War.

II.

The contract is not a "requirements contract" and the construction placed upon it by the government and by the Court of Claims below would render it unenforceable for lack of consideration and mutuality.

The more common commercial contract specifically sets out the obligations of both parties. In other words, the considerations exchanged by the promisor and promisee are for a definite amount and definitely stated. The exigencies of modern business have developed a type of contract known as "the requirements contract."

When the production of a company cannot be accu-

rately estimated and it is the desire of a purchaser to take the entire output of such a company, a contract binding in law may be drawn which obligates the producer to sell his entire product to the consumer, and the consumer to buy the entire product of the producer. Conversely, if a consumer cannot accurately estimate his needs, he may enter into a legally binding contract which requires him if he consume any goods to buy them of the producer, and the producer in turn is obligated to supply any of the goods which the consumer may require.

The fundamental difficulty with contracts of this type has always been the mutuality of consideration. The courts have finally answered the question by taking the position that the detriment suffered by the producer in the first example is that if he produce any goods he must deliver them under the contract to the consumer. It is true that he may avoid his obligation by failing to produce any goods, but there is still a detriment to him in that if he does produce goods these goods must be delivered to the consumer at the stated price. In other words, the producer has bound himself in one particular economic activity to one man, the consumer, by express contract. The converse is true in the second example, where the consumer may negative the contract by failing to consume any of the goods, but in the event of his consuming any of the goods binds himself to take them from the producer. In both of these cases it is plainly evident that there has been a detriment suffered.

The following cases illustrate this type of contract. In *Higbie vs. Rust,* 211 Ill., 333, the Court, at page 336, said:

"It will be observed that both by the conversation at Keene and the letter relied upon, Rust stated that he would furnish all the pails that Higbie 'wanted.' If it be conceded that the latter accepted this proposition, we think the contract cannot be enforced, for the reason that it is lacking in mutuality. By its terms Rust would be obliged to sell, but Higbie would not be obliged to buy. The fact that Higbie was an extensive dealer in pails, supplying many customers, does not alter the situation. He might elect to sell no five-pound jelly pails whatever, or to purchase all he should sell from some person other than Rust. There was no agreement on Higbie's part to take or want such pails as he might sell to his trade, or to take or want any pails whatever."

Again, at page 337:

"Where there is no consideration for the promise of one party to furnish or sell so much of the commodity as the other may want, except the promise of the other to take and pay for so much of the commodity as he may want, and there is no agreement that he shall want any quantity whatever, and no method exists by which it can be determined, whether he will want any of the commodity, or, what quantity he will want, the contract is void for lack of mutuality."

As will be seen from the quoted excerpts the vice of this attempted contract was that no consideration flowed from Higbie to Rust. Higbie suffered no detriment. Rust simply bound himself to supply all the pails that Higbie wanted and, as the Court pointed out, not only might Higbie decide to sell his pails, but he might sell his pails and buy them from another producer. It is thus seen that Higbie's promise amounted to a nullity.

The language of the Court in *McIntyre Lumber and Export Co. v. Jackson Lumber Co.,* 165 Ala., 268, at page 271, draws the distinction between a situation such as that raised in the *Higbie* case and the situation in which the contract was to take all of the articles needed by a consumer in a given business during a limited time. The words of the Court follow:

> "It is true that a contract for the future delivery of personal property may be void because there is no consideration or mutuality, if the contract or any material part of it is wholly conditioned upon the will, wish, or want of only one of the parties; but an accepted offer to furnish or deliver such articles as may be needed or consumed by a person in a given business, during a limited time, is binding because it contains the accepted offer to purchase all the articles thus required during this time, and from the party who invokes the offer, but a mere offer to furnish such as a party might want or desire would be void. A contract to purchase the entire output of a mill or plant, for a given and reasonable time, at a given price is valid, and so, likewise, is a contract to purchase the entire output of a certain product of a plant, such as all the heart lumber, at a certain price; but an agreement to purchase all that the manufacturer desired to sell to the purchaser, at a certain price, or all that the purchaser desires to take, at a certain price, would be void."

In *Fowler Utilities Co. v. Gray,* 168 Ind., 1, the facts were as follows:

The appellant agreed to install a hot water heating plant and to supply sufficient heat to heat the premises to 78 degrees, Fahrenheit, for $50 per annum as long as the appellee desired heat to be supplied. The appellant increased the price of the service and the appellee

sought injunction. One of the grounds for refusal of the injunction was that there was no mutuality of consideration in that the appellee could terminate the contract at will.

In other words, this was the *Higbie* type of contract dependent on the will or whim of the parties and not on the needs or necessities of the situation.

In *Bailey v. Austrian,* 19 Minn., 535, the facts were as follows:

The plaintiffs being engaged in a general foundry business at St. Paul, the defendant promised to supply them with all the Lake Superior pig-iron wanted by them in their said business, between certain dates, at specified prices, and at the same time plaintiffs promised to purchase from said defendants all of said iron which they might want in their said business, during such time, at specified prices. The Court held that there was no mutuality of engagement and that therefore there was no valid contract.

It is submitted that this case goes very far in its refusal to find a mutuality of consideration. It would seem that the words "wanted by them in their said business" were equivalent to "used by them in their said business," yet the court so jealously guards this requirement of a definite consideration that even here the promise was held illusory.

In *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Company,* 114 Fed., 77 (Circuit Court of Appeals, 8th Circuit), the Court, at page 80, said:

> "It is said that the intention of the parties was to make an agreement that the plaintiff should sell and deliver, and the defendant should buy, all the articles of the character specified in the offer which should be needed or required by its business be-

tween October 27, 1898, and June 1, 1899; that the purpose of the construction and interpretation of contracts is to ascertain the intention of the parties, and that this contract should be interpreted to effect this intent. The answer is that, while ambiguous terms and doubtful stipulations may be interpreted to carry out the intention of the parties when they fairly evidence it, their secret intention cannot be imported into contracts whose terms and meaning are plain and unambiguous, and do not express it."

Again, at page 81:

"The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration, and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonably certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. *Wells v. Alexandre,* 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; *Minnesota Lumber Co. v. Whitebreast Coal Co.* (Ill. Sup.), 43 N. E. 774, 31 L. R. A. 529; *Parker v. Pettit,* 43 N. J. Law. 512. But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned."

If the Government's contention in the present case be logically followed it results of necessity that the whole undertaking is void for lack of consideration under the doctrines as enunciated in the cases cited above.

The needs of a naval station such as that at Hampton Roads are not susceptible of any definite approximation such as the needs of a manufacturer or a public utilities corporation. Thus if the bids for coal at Hampton Roads were lower than those at other Atlantic ports there would be nothing to prevent the Navy Department under its interpretation of this contract from diverting many of its vessels to the port of Hampton Roads for the express purpose of coaling. In other words the so-called needs of the Navy at Hampton Roads were in reality nothing more than what the Navy Department officials might deem to be convenient for the interests of the government. Another way of putting this would be a contract for "what coal the Navy Department might want to be supplied at Hampton Roads."

"Looking for a minute at the other side of the contract: How would the Atwater Company in a suit for breach of contract prove what were the needs at Hampton Roads? The Navy Department if it was not satisfied with its contract with the Atwater Company, might have its vessels coaled at other points and contend that under the contract no coal was needed at Hampton Roads. This analysis of the situation at the Naval Station is simply given to impress the court with the fact that it can hardly be termed a "requirements" contract, as the needs of the Navy are not based upon the necessity of any fixed plant at Norfolk, but are entirely susceptible to the whims and wishes

of the Departmental heads. It is suggested, therefore, that this case is lacking in that essential element of mutuality of consideration which is necessary to make binding a requirements contract within the rules laid down by the cases cited above.

Manifestly, the Government under its invitation for bids could have apportioned 400,000 tons to contractor A and 200,000 tons to contractor B. The construction contended for by the government must lead to the conclusion that had the Navy Department used but 400,000 tons of coal and contractor A's price had been more attractive than that of contractor B, the Navy Department could have taken all of the 400,000 tons from contractor A. Therefore, the agreement would have been a *nudum pactum* as the Navy Department would have consumed its full requirements as to coal, viz., 400,000 tons and not taken one ton from contractor B. This must follow from the plain language of the contract as construed by the Government.

Thus the Navy Department may order any quantity of the coal which may be needed and is not obligated to order any specific quantity. In other words the Navy Department is not bound to order any specific quantity of its needs. Of course there is no mutuality in any such agreement.

If these excerpts from the invitation for bids which were pasted on the contract are to be thus strained to justify the interpretation of the Navy Department this appellant claims the right to the most strict interpretation of the "Reservations" clause which was also pasted on to the contract sheet. That clause (Rec. 12) reads as follows:

> "The Government reserves the right to reject any and all bids, and in accepting any bids for

> the different ports of delivery named the right is also reserved to make such distribution of tonnage among the different bidders for suitable and acceptable coals for the naval service as will be considered to be for the best interests of the Government" (Rec. 12).

When this clause becomes a part of the contract it can only mean that after the bids are accepted "the right is reserved to make such distribution of tonnage * * * as will be considered for the best interests of the Government." Such a provision makes the whole promise on the part of the Government illusory and renders the agreement void and unenforceable as a *nudum pactum.*

Even if the Government could surmount all of these difficulties the record plainly shows that the contract did not cover the requirements of the Navy Department at Hampton Roads.

The Court of Claims was somewhat embarrassed by this consideration in the case of *Willard, Sutherland and Company v. The United States* in which an opinion of more length is given than that in the Atwater case. The litigation arose over a contract of the same nature—in fact a bid on the same invitation.

The Court in that case said:

> "It seems to us quite pertinent as bearing upon the proper determination of plaintiff's obligation under the contract in question to consider the situation as it would have been had one party, the plaintiff or anyone else, bid to furnish the entire 600,000 tons stated in the submitted form of proposal and, upon acceptance of its bid, entered into a contract in the form now under consideration. What would have been the limits of the contractor's rights and obligations? Would the con-

tract of necessity be construed as for the specific amount named or might there be a variance dependent on the needs of the naval service at that port?

"Incorporated in an annual contract entered into by a bidder who proposed to furnish the entire estimated quantity of 600,000 tons, can there be any doubt that these provisions would relieve the Government from ordering more than 500,000 tons if perchance no more was needed or would permit it to order and require the contractor to furnish 700,000 tons if needed by the Navy Department at this port? If one contract had thus been made for the entire estimated quantity it is not at all likely that such a question as is here presented would ever have arisen. Contracts indefinite in quantity but measured by a need are enforceable to the extent of the need. *Brawley v. United States,* 96 U. S. 168.

"It was provided in the general condition of the schedule incorporated in the contract that such distribution of tonnage among "the different bidders for suitable and acceptable coals for the naval service" might be made as should be considered for the best interests of the Government, and when the distribution was made it was evidently the intention to apportion the obligation of supplying the needs rather than to apportion a specific quantity.

"If the conclusion was right that under a single assumed contract for the entire estimated amount, with the attendent conditions attached, the Government might have ordered but 500,000 tons, or, on the other hand, might have required the furnishing of 700,000 tons if it needed that amount, the conclusion must follow that under an apportionment plan the plaintiff must assume its proportionate part of the entire obligation and be subject pro rata to the same requirement. This is all that was required of it and for present pur-

> poses we are not concerned with any question as to the result had the attempt been made to impose on it the burden of some other contractor. The correspondence clearly indicates an intention to equitably distribute the burden as to the needs in excess of the estimated quantities and shows that the requirement of the plaintiff was in direct proportion to the total excess needs over the estimated quantity." (56 Ct. Cls., 413, 418.)

This theory, upon which the court below predicated its opinion, is very interesting, but, we submit, has no foundation in law. It is of course fundamental that the rights of parties to a written contract are to be found within the four corners of the instrument. Reference to the full contract as set out on pages 5 to 11 of the Record in this case will fail to show any clause which commits the appellant to furnish a proportional part of the needs of the Navy at Hampton Roads. In fact, the contract as signed does not even mention the 600,000 tons which the invitation for bids specified as the estimate of the total needs. The general specifications, on page 7 of the Record, in view of the other facts appearing in the Record, cannot be held to bind the Navy Department to buy all of its coal at Hampton Roads from the appellant and the appellant to supply all of the needs of the Navy at Hampton Roads, as the Record abundantly shows that there were several contractors bidding to supply coal to the Navy at Hampton Roads under the invitation issued by the Navy Department. What the Court of Claims has done is to read into the contract terms that are not there included. In order that the contract have the significance that the Court of Claims has given it, it would be necessary that it contain a clause binding the appellant to supply a stated fractional amount of

all the coal that the Navy would require at Hampton Roads. In other words, had the appellant contracted to supply one-tenth of all of the coal that the Navy used at Hampton Roads, the opinion of the Court of Claims would have some foundation provided that the general specifications could be tortured into a requirements contract. When it is considered that the Navy Department drew the contract and that, therefore, its terms must be construed most strictly against it (*Garrison v. The United States,* 7 Wall. 688), it becomes ridiculous to read into the contract any clause apportioning definite fractional amounts of the total requirements of the Navy at Hampton Roads to the appellant Company.

In *Garrison v. The United States,* supra, at page 690, the Court said:

> "The supplementary agreement is signed by General Butler, and not by plaintiff. Its doubtful expression should, therefore, according to a well-known rule, be construed most strongly against the party who uses the language."

The negotiations leading up to the contract form no part of it, as they do not appear in the instrument itself. *Tayloe v. Riggs,* 1 Peters 591, 598.

There is a general rule that the intention of the parties to a contract is to be deduced from the language employed by them, and that the terms of the contract, when unambiguous, are conclusive in the absence of averment or proof of mistake, the question being not what intention existed in the minds of the parties, but what intention was expressed in the language they used. The following cases are indicative of this rule:

Gavinzel v. Crump, 22 Wall. 308.

Gavinzel loaned Crump $3,260 and Crump gave Gavinzel his bond for that amount. The loan was made in confederate currency and became due before the termination of the war. Crump kept funds in Richmond to pay the debt, but could find no one authorized to receive them; in the meantime the funds lost all of their value. The bond did not require Gavinzel to appoint an attorney to receive the funds at Richmond. The Court, at page 319, said:

> "Crump may have understood that his right to discharge the bond by the tender was to become absolute if the war lasted (and so long as it lasted) after April 1, 1864, but the contract does not admit of a construction consistent with that understanding. And the court cannot, without evidence authorizing it to be done, import words into the contract which would make it materially different in a vital particular from what it now is. There is no occasion to introduce parol evidence to explain anything in the contract, because there is no ambiguity about it, and it is not competent by this sort of evidence to alter the terms of a contract, by showing that there was an antecedent parol agreement or understanding between the parties different in a material particular from that which the contract contained. But if it were competent the evidence fails to establish any such antecedent agreement."

See also:

President Suspender Co. v. MacWilliam, 238 Fed. 159.

Vinton Petroleum Co. v. Sun Co., 230 Fed. 105.

Cottrell v. Michigan United Traction Co., 184 Mich. 221.

Nelson Creek Coal Co. v. West Point Brick & Lumber Co., 151 Ky. 835.
Goldstein v. D'Arcy, 201 Mass. 312.
Illinois Central R. R. Co. v. Vaughn, 33 Ky. Law. Rep. 906; 111 S. W. 707.
Cameron v. Sexton, 110 Ill. App. 381.
Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal and Coke Co., 105 Va. 785.
Schreiber et al. v. Straus, 147 Ill. App. 581.

It is not the province of the court to alter a contract by construction or to make a new contract for the parties. Its duty is confined to the interpretation of the contract which the parties have made for themselves.

In *Engine Co. v. Paschall*, 151 N. C. 27, the Court said:

> "As the contract is lawful and expressed with definiteness and certainty, the Court is not at liberty to alter it by construction or make a new agreement for the parties."

Especially is this true in view of the fact that Paragraph (a) of the "Notes" of the invitation for bids specifically provided that a bidder might confine himself to a bid on less than the entire quantity of coal specified, that amount in this case being 600,000 tons, and that such partial bids should state the amount of tonnage it was proposed to furnish.

Reference to the contract in this case will show that the Atwater Company did not bid on the estimated requirements of the Navy at Hampton Roads but confined itself to bidding on 200,000 tons. This bid was accepted by the Navy Department, and nowhere is it stated in this contract that the requirements for the Navy were 600,000 tons. The 600,000 tons was the

quantity specified in the proposal, and does not appear in the body of this contract. It is therefore evident that the Atwater Company did not bid on any requirement for the full tonnage of coal, estimated for the use of the Navy at Hampton Roads.

The Atwater Company pursued this course in accordance with paragraph (a) of the "Notes" on the invitation for bids which read as follows:

> "Bids on less than entire quantity of coal specified on each class will be received and considered. Such partial bid must state the amount of tonnage it is proposed to furnish subject to the other conditions of these specifications."

There is, therefore, no question that the Atwater Company confined itself to a bid of 200,000 tons of steaming coal to be supplied the Navy at Hampton Roads.

With these facts in mind it is desired to again call attention to the case of *Brawley v. The United States*, 96 U. S. 168, the case relied upon by the Government in the Court of Claims.

It is plainly evident that the contract in the *Brawley Case* sought to cover the full requirements for wood of the troops and employees at the Post. Therefore, as the Court points out, the 880 cords was merely an estimate of this quantity and the contract was a requirements contract. In its opinion the Court draws the distinction between the contract based on "an *entire* load deposited in a certain warehouse or *all* that may be manufactured by the founder in a certain establishment or that may be shipped by his agent or his correspondent in said vessels," *which is followed by an estimated amount of this quantity with the words*

"about" or "more or less," and the case where no such dependent circumstances are referred to and the engagement is to furnish goods of a certain quality or character to a certain amount. In that case the Court says that the quantity specified is material and governs the contract.

This Court in *Moore v. The United States,* 196 U. S. 157, at pages 167 and 168, differentiates the *Brawley Case* from the case similar to the one at issue here. At these pages the Court said:

> "By the terms of the second contract (June 23, 1898) the appellant agreed to deliver and the United States agreed to 'receive about 5,000 tons' of coal, delivery to commence with about 2,200 tons to arrive at Honolulu on or about the 1st day of October, 1898. By the 7th of October delivery was made of 4,634 tons. About a month subsequently appellant purchased 366 tons of coal of a ship then in the harbor, and tendered the coal to the United States in fulfilment of the contract to deliver 5,000 tons. The United States refused to receive it, and appellant sold it in the open market for $3.06¼ per ton less than $9, the contract price. This was the best price which could be obtained, and the loss to appellant was $1,120.87. The Court of Claims held that the appellant was not entitled to recover. We think this was error. The obligations of parties were reciprocal; one to deliver, the other to receive, about 5,000 tons of coal, and equally reciprocal is the liability for nonperformance of the obligations. The only question can be, Is 366 tons less than 5,000 tons, 'about 5,000 tons?' We think not. The difference is too great. We said in *Brawley v. United States,* 96 U. S. 168, 172, 24 L. Ed. 622, 624, that in engagements to furnish goods to a certain amount the quantity specified is material and governs the

contract. 'The addition of the qualifying words 'about' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight." See also:

Cabot v. Winsor, 1 Allen, 546, 550; *Salmon v. Boykin,* 66 Md. 541, 7 Atl. 701; *Indianapolis Cabinet Co. v. Herrman,* 7 Ind. App. 462, 34 N. E. 579; *Cross v. Eglin,* 2 Barn. & Ad. 106; *Morris v. Levison* L. R. 1, C. P. Div. 155, 158; *Bourne v. Seymour,* 16 C. B. 337, 353; *Simpson v. N. Y., N. H. & H. R. R. Co.,* 38 N. Y. Supp. 341, 342.

"The Record does not inform us why the United States refused the tender, and we must assume that it had no other justification than its supposed right under the contract."

The facts in the *Moore Case* did not reveal a requirements contract and this Court refused to consider a variation of much less than ten per cent covered by the word "about."

It is submitted that the contract under consideration here did not bind the appellant to furnish coal to the extent of the needs of the Navy at Hampton Roads, and this Court will not interpret the contract to be a requirements contract when to do so would render it nugatory as illusory. Therefore the contract was one for the delivery of a maximum of 200,000 tons of coal.

III.

Delivery of the excess tonnage under protest did not commit the appellant to accept the purchase price set out in the contract.

The Court of Claims in the case of *Willard, Sutherland and Company v. The United States* predicated its opinion not only upon the construction of the con-

tract but upon the grounds that delivery of this coal by the contractor foreclosed it from claiming, upon any theory of implied contract or *quantum meruit,* for the difference between the market price and the contract price for coal delivered in excess of 200,000 tons. This opinion controlled the present case.

The Court of Claims in its opinion states that the Record shows this additional tonnage was furnished under protest. These facts are also applicable to the present case (Rec., 13, 14).

If the claimant as a matter of law was not required by the contract to furnish the additional tonnage, then the agreement, if any, under which such coal was furnished must be derived from sources other than the contract. The only other source from which any express agreement can be derived must be the correspondence which passed between the parties relative to the matter. The synopsis of this correspondence as set out on pages 13 and 14 of the Record shows that the appellant was notified by the Navy Department before it had furnished the 200,000 tons, namely, on March 26, 1917, that it would be expected to furnish an additional amount of coal under its contract to the extent of about ten per cent. Replying to this communication the appellant expressed its surprise and stated that it had not bid on tonnage in excess of 200,000 tons. The Navy Department reiterated its demands that an additional 20,000 tons of coal be furnished quoting the provisions of the contract which have been discussed under Point I, *supra.*

On April 17th the appellant replied calling attention to the relief clause and asking that it be applied to the contract. The Navy Department on April 30th wrote to appellant insisting on delivery of the ten

per cent additional tonnage. In reply to this letter the appellant stated that it did not agree with the Navy Department but offered to compromise by supplying 11,781 tons additional at the contract price and billing the Navy with any excess at the market price. On April 26th the Navy Department replied that it was entirely impracticable for the Department to recede from its request for the ten per cent additional over the estimated quantity in the contract. On May 22nd the appellant acknowledged an assignment to it of 10,000 tons to be delivered at Lamberts Point between June 1st and 10th again stating the conditions of its contract showing that some 4,430 tons in excess of the 200,000 tons had already been delivered and with other assignments outstanding the appellant had delivered all but 2,920 tons of the 20,000 tons excess demanded by the Department. On June 2nd the appellant wired again stating that they were delivering 8,219 tons under protest. This was the amount in excess of the compromise figures which the Navy Department refused to accept. (Rec. 13, 14.)

This correspondence undoubtedly shows that the Navy Department at all times refused to compromise the claim and therefore it cannot be said that any of the *19,990* tons of coal were furnished to the Navy Department under any contract or agreement. One thing is certain from the correspondence and that is that the appellant did not agree to furnish the additional coal at the contract price. The correspondence very definitely shows that the parties were not agreed as to the terms upon which this additional coal was to be furnished. The gist of the correspondence was that the appellant was willing to accept the contract price on some of the extra coal provided that the

market price was paid upon 8,219 tons which it figured it had delivered to the Government in excess even of the construction which the Navy Department desired to place upon the contract in which construction it offered to acquiesce provided the Department would pay the market price upon the 8,219 tons. This offer was never accepted by the Navy Department. *Indeed the Record will be searched in vain for any acceptance on the part of the Navy Department upon the terms stated by the appellant under which it would furnish the coal.*

At this time the United States was at war with Germany, and there was a tremendous pressure of public opinion which would have precluded this appellant as a business concern from failing to supply coal demanded by the United States Government. The only practical course that it could take was to supply the coal as it did under protest. The situation is quite different from that which would have arisen if two private parties were dealing at arms' length. It should be remembered, however, that coupled with the fact that the United States Government was at war, and that patriotic motives and public opinion were very strong factors compelling the Atwater Company to supply this coal on demand, the United States Government had a further power of requisition beyond and above its contractual powers. This appellant was under double pressure when it acquiesced in the demands of the United States Government. Furthermore, the appellant was under bond with the Casualty Company of America as surety in the amount of $140,000 (Rec., 11). These facts most assuredly set out a stronger case of "duress" than the facts in the case of *Freund and Roemmich v. The United States,*

supra. In that case the Court in holding that acquiescence in the demands of the P. O. Department to carry mails over a new route was not under the circumstances sufficient to bar recovery for what those services were reasonably worth, said:

> "At the time the contract was executed, the Department had formed the purpose to thrust on the contractors this burdensome route, but it did not advise them of it until ten days before July 1st, and, indeed, did not give them the exact schedule until the day before they were to begin it. Then the only course open to them was either to engage the old contractor's equipment at a heavy loss or throw up the original contract and run the risk of the government's reletting at a higher bid and charging the possible heavy difference in cost to it against them on their bond for a five year contract. We cannot ignore the suggestion of duress there was in the situation or the questionable fairness of the conduct of the government, aside from the illegality of the construction of the contract insisted on, and have no difficulty, therefore, in distinguishing this case from the so-called Railroad Mail Cases (*Eastern R. R. Co. v. United States,* 129 U. S. 391; *C. M. & St. P. Ry. Co. v. United States,* 198 U. S. 385; *Atchison Railway v. United States,* 225 U. S. 640; *N. Y., N. H. & H. R. R. v. United States,* 251 U. S. 123; and *N. Y., N. H. & H. R. R. v. United States,* decided by this Court February 27, 1922), which are cited on behalf of the United States."

This is not the only case in which this doctrine has been announced. In the case of the *United States v. Utah, N. & C. Stage Co., supra,* the contractor had performed his contract and was suing for the extra compensation which the court granted.

In the case of *Hunt v. The United States, supra,* the

contractor had performed the extra services under protest, and the Department had addressed an order to him that such service should be without additional pay "in accordance with the terms of his contract." The Court in allowing recovery, used the following language:

> "Weighel was the only person legally bound to perform the original contract; it was from him that the government demanded the extra service, and under the facts found by the lower court the obligation to pay for that service was to him, whether he performed it personally or through another. The government accepted performance by him of the obligation under the original contract, and the law requires payment to Weighel for the former as much as it required the payment which was made to him for the latter."

It is submitted that the doctrine of these cases applies with increased force to the situation in which the Atwater Company found itself when demand was made upon it for the furnishing of additional tonnage and that its compliance with this demand of the Government did not in any way debar it from seeking the additional compensation asked for in the Court of Claims.

Furthermore we confess to be unable to find any such doctrine in the books as that announced by the Court of Claims in the case of *Willard, Sutherland & Co. v. The United States, supra.* As that opinion controlled the decision in this case it will be fitting to quote from it here.

The Court of Claims, at page 422, said:

> "It maintains and the record shows that it furnished this additional 1,000 tons of coal under

protest and that it specifically reserved the right to take proper steps for the recovery of the difference between the market and the contract price of the coal. Assuming that it was not obligated under the contract to furnish this additional amount, can a mere protest give it any rights of recovery in the face of the fact that it did furnish in response to a specific demand that it should furnish it under the contract. There was never at any time any other attitude on the part of the representative of the Government than that the plaintiff was obligated under its contract to furnish the coal in question. At all times the demand was that it be furnished under the contract and the plaintiff so understood the demand. There was nothing in the whole transaction from which could be inferred any intention on the part of the officer in charge for the defendant to purchase or pay for this coal otherwise than under the contract. The minds of the parties never met upon any proposition in that respect and, immaterial though it may be, the officer in charge never even gave recognition to the plaintiff's attempt to reserve a right to seek recovery of additional compensation."

Surely these words announce a most astounding doctrine and, we believe, one which this Court will not be inclined to affirm without the citation of some very definite and controlling authority. We have seen no such authority.

Granted that the contract in this case was for the maximum amount of 200,000 tons, that amount had been supplied and the contract, therefore, was *fully executed*, and the Atwater Company "was not obligated under the contract to furnish this additional amount" of tonnage. The only way in which an obligation to supply this additional tonnage could arise would be by another contract.

We know of no other way to raise such an obligation. One party cannot waive another into a contract. When the minds of the parties never meet discord can not make a contract. If A says to B "I do not like your offer, but here is some coal you can have on other terms," and B says "No, I do not like your terms but I will take them on mine," can it be said that there has been a meeting of the minds and a contract has been entered into by which B is only obligated to pay for the coal on his terms?

The Court says "There was nothing in the whole transaction from which could be inferred any intention on the part of the officer in charge for the defendant to purchase or pay for this coal otherwise than under the contract." That is one side of the negotiation. It takes two parties to make a contract. There is nothing in the whole transaction from which it could be inferred that the Atwater Company delivered this coal at the contract price. There was never a clear and unambiguous meeting of the minds at the price of $2.80 a ton. If we must look for a contract *de novo*—and that we must do if the original contract was one for a maximum amount of 200,000 tons, which had been completely executed—it is submitted that no Court could say that there had been a meeting of the minds as to the price of the coal.

The Court of Claims says: "The minds of the parties never met upon any proposition in that respect," *i. e.*, to pay a price different from that specified in the executed contract. Can it be said that the minds of the parties met upon the price fixed in the executed contract? That is the test of whether or not a contract has been entered into.

We strongly urge that the contract for 200,000 tons

had been executed: that the minds of the parties had never met as to the terms on which the excess coal was subsequently delivered, and that when, under these conditions, the proper officers of the United States Government appropriated this coal to the Government's use, they could not take the law unto themselves and say you have contracted to deliver this coal at $2.80 a ton. Any such doctrine would be revolutionary in the law of contracts.

It is submitted that the Government took the coal when there had been no meeting of the minds, and, therefore, an implied contract to pay the market price arose. It is on this contract that appellant seeks recovery.

CONCLUSION.

The judgment of the Court of Claims should be reversed and the case remanded with instructions to enter judgment for the plaintiff for the amount claimed in the petition, namely, $73,964.48.

Respectfully submitted,

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